Majlis Islam Negeri Johor v United Merchant Finance Bhd (MUI Continental Insurance Sdn Bhd, Third Party)

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-6-1994
ABDUL MALIK ISHAK J
2 MAY 1995

Civil Procedure *— Summary judgment — Plaintiff delayed in filing application — Defendant delayed in filing affidavit in reply — Whether plaintiff's failure to explain delay should be unfavourably construed — Rules of the High Court 1980 O 14*

Civil Procedure *— Affidavits — Summary judgment — Affidavits in reply must comply with O 32 r 13(2)(b) — Affidavits would not be considered if they did not so comply — Rules of the High Court 1980 O 32 r 13(2)(b)*

Civil Procedure *— Summary judgment — Issues of constructive trustee and fraud — Whether bona fide triable issues — Rules of the High Court 1980 O 14*

The plaintiff's claim was for a sum of RM1m together with interest at the rate of 8% pa from November 1985 till the date of full payment being a sum which the plaintiff claimed it had deposited with the defendant's branch office. The statement of claim stated that the defendant was liable under the fixed deposit receipts or alternatively the defendant held the RM1m as constructive trustee of the plaintiff. The plaintiff applied for summary judgment under O 14 of the Rules of the High Court 1980 ('RHC'). The writ and the statement of claim were dated 5 January 1994 but the plaintiff filed its application for summary judgment on 7 June 1994. The defendant entered an appearance on 14 April 1994 and filed its statement of defence on 14 May 1994. Therefore, the plaintiff's application for summary judgment was delayed as it was filed after the defence. The defendant's affidavit in reply to the plaintiff's application was also delayed in that it was filed on 3 February 1995 while O 32 r 13(2)(b) of the Rules of the High Court 1980 stipulated that the defendant's affidavit in reply should be filed and served on the plaintiff within 14 days from the date of the plaintiff's affidavit.

Held, dismissing the plaintiff's application:

(1) Order 14 of the Rules of the High Court 1980 was silent as to the consequences of delay in filing the application for summary judgment and the plaintiff's failure to explain the delay would not be construed unfavourably against the plaintiff. The court would condone the delay.

(2) All affidavits-in-reply to O 14 applications had to comply with O 32 r 13(2)(b) of the Rules of the High Court 1980, failing which the affidavits ought not to be considered.

(3) Constructive trustee and fraud were substantive legal issues which required close investigations and, in the interest of justice, there should be a trial.

(4) The principles of knowing receipt and knowing assistance would come into play in the context of a relationship between a banker and a customer and these would be ventilated through witnesses during the trial proper. From the facts, this was certainly not a plain and straight forward case. It was devious and crafty and a trial was the best solution.

(5) This was a complicated case. The defendant had filed a third party notice and a statement of claim against MUI Continental Insurance Sdn Bhd. The third party had filed its amended statement of defence against the statement of claim of the defendant. These constituted 'some other reason' as to warrant a trial.

[Bahasa Malaysia summary

Tuntutan plaintif adalah untuk sejumlah RM1 juta bersama dengan faedah pada kadar 8% setahun dari November 1985 hingga tarikh bayaran penuh, iaitu satu jumlah yang dikatakan plaintif telah disimpannya dengan pejabat cawangan defendan. Pernyataan tuntutan menyatakan bahawa defendan bertanggungan di bawah resit-resit simpanan tetap atau sebagai pilihan defendan memegang RM1 juta itu sebagai pemegang amanah konstruktif plaintif. Plaintif telah memohon untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Writ dan pernyataan tuntutan bertarikh 5 Januari 1994 tetapi plaintif telah memfailkan permohonannya untuk penghakiman terus pada 7 Jun 1994. Defendan telah memasukkan kehadiran pada 14 April 1994 dan memfailkan pernyataan pembelaannya pada 14 Mei 1994. Oleh itu, permohonan plaintif untuk penghakiman terus adalah terlambat kerana ianya telah difailkan selepas pembelaan difailkan. Afidavit jawapan defendan kepada permohonan plaintif juga terlambat, yakni ianya difailkan pada 3 Februari 1995 sedangkan A 32 k 13(2)(b) KMT memperuntukkan bahawa afidavit jawapan defendan harus difailkan dan disampaikan pada plaintif dalam masa 14 hari daripada tarikh afidavit plaintif.

Diputuskan, menolak permohonan plaintif:

(1) Aturan 14 KMT senyap berkenaan dengan kesan kelewatan dalam memfailkan permohonan untuk penghakiman terus dan kegagalan plaintif untuk menerangkan kelewatan itu tidak akan diambil secara bertentangan terhadap plaintif. Mahkamah akan membenarkan kelewatan itu.

(2) Semua afidavit jawapan kepada permohonan A 14 mesti mematuhi A 32 k 13(2)(b) KMT. Jika tidak afidavit itu tidak patut dipertimbangkan.

(3) Pemegang amanah konstruktif dan fraud adalah isu-isu undang-undang yang substantif yang memerlukan siasatan yang terperinci dan, demi kepentingan keadilan, haruslah diadakan satu perbicaraan.

(4) Prinsip-prinsip 'knowig receipt' dan 'knowing assistance' adalah terpakai di dalam konteks hubungan di antara sebuah bank dan seorang pelanggan dan ini akan diutarakan melalui saksi-saksi semasa perbicaraan. Dari fakta kes, ini tentunya bukan satu kes yang jelas dan mudah. Kes ini adalah licik dan penuh tipu muslihat dan satu perbicaraan adalah penyelesaian yang terbaik.

(5) Ini adalah satu kes yang sukar. Defendan telah memfailkan satu notis pihak ketiga dan satu pernyataan tuntutan terhadap MUI Continental Insurance Sdn Bhd. Pihak ketiga telah memfailkan pernyataan pembelaan terpindanya terhadap pernyataan tuntutan defendan. Ini adalah 'alasan-alasan lain' yang mewajibkan satu perbicaraan.]

Notes

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3197–3520.

Cases referred to

Bank für Gemeinwirtschaft Aktiengesellschaft v City of London Garages [1971] 1 WLR 149; [1971] 1 All ER 541 (folld)

Barnes v Addy (1874) 9 Ch App 244 (refd)

Cooke v Gill (1873) LR 8 CP 107 (refd)

Foxton v Manchester & Liverpool District Banking Co (1881) 44 LT 406 (refd)

Hernaman v Smith (1855) 10 Ex 659; 156 ER 603 (refd)

Huo Heng Oil Co (E M) Sdn Bhd v Tang Tiew Yong [1987] 1 MLJ 139 (refd)

Jacobs v Booths Distillery Co (1901) 85 LT 262 (refd)

Krishnamurthy & Anor v Malayan Finance Corporation Bhd [1986] 2 MLJ 134 (refd)

Letang v Cooper [1965] 1 QB 232; [1964] 3 WLR 573; [1964] 2 All ER 929; [1964] 2 Lloyd's Rep 339 (refd)

Lipkin Gorman v Karpnale Ltd [1987] 1 WLR 987 (refd)

McLardy v Slateum (1890) 24 QBD 504 (refd)

Miles v Bull [1969] 1 QB 258; [1968] 3 WLR 1090; [1968] 3 All ER 632 (folld)

Montagu's Settlement Trust, Re [1987] Ch 264; [1987] 2 WLR 1192 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Read v Brown (1888) 22 QBD 128 (refd)
Roberts v Plant [1895] 1 QB 597 (refd)
Robinson, King & Co v Lynes [1894] 2 QB 577 (refd)
Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi [1978] 2 MLJ 267 (refd)
Tractors Malaysia Bhd v Joseph Thambirajah & Anor [1986] 2 CLJ 72 (refd)
Wing Tiek Holdings Bhd v Yong Chee Thiam & Anor [1994] 3 MLJ 379 (refd)

Legislation referred to

Rules of the High Court 1980 O 14 rr 3(1), 4(1), O 18 r 7(1), O 32 r 13(2)(b)

S Sagadeva (*Saga & Associates*) for the plaintiff.
Ong Ming Suan (*Raja Eleena Siew Ang & Tan*) for the defendant.

Abdul Malik Ishak J: By summons in chambers (encl 15), the plaintiff applied for summary judgment against the defendant under O 14 of the Rules of the High Court 1980 ('RHC'). Enclosure 15 was dated 7 June 1994 and it was supported by an affidavit affirmed by Dato' Haji Lokman bin Thany, in his capacity as president of the plaintiff, and this affidavit of his was affirmed on 28 May 1994 (encl 15A). Both encls 15 and 15A were served on the defendant's solicitors on 14 July 1994. The defendant took time to reply and this they finally did by filing an affidavit-in-reply affirmed by Chuah Ai Huah on 3 February 1995 (encl 28) which was duly served on the plaintiff's solicitors on 6 February 1995. Obviously there was delay on the part of the defendant to reply to the plaintiff's affidavit in encl 15A and this delay was highlighted by Encik S Sagadeva, the learned counsel for the plaintiff, to drive home the point that such delay should be construed against the defendant. Order 32 r 13(2)(b) of the RHC provides in strong terms:

> (2) Save as otherwise provided in these rules —
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

Encik S Sagadeva submitted further that the return date for encl 15 was 8 August 1994, and on that date the defendant has yet to file their affidavit-in-reply. Cik Ong Ming Suan, the learned counsel for the defendant, agreed that there was delay and urged this court to penalise the defendant in terms of costs and not to shut off the defendant totally by rejecting encl 28. She was on firmer ground when she argued that even though the writ and the statement of claim were dated 5 January 1994, yet the plaintiff only filed their application for summary judgment

on 7 June 1994 — a delay of five months two days. She argued further that the defendant entered an appearance on 14 April 1994 (encl 4) and filed their statement of defence on 14 May 1994 (encl 9) and taking into account the date when the application for summary judgment was filed from the date wherein the statement of defence was filed, there was a delay of 23 days. These delays were said to be inordinate and fatal as the plaintiff did not seek to explain those delays in encl 15A. It is pertinent to point out that immediately after the defendant had entered an appearance on 14 April 1994, the plaintiff is entitled to apply for summary judgment (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; *McLardy v Slateum* (1890) 24 QBD 540; *Krishnamurthy & Anor v Malayan Finance Corporation Bhd* [1986] 2 MLJ 134). But the plaintiff is not precluded from filing his application for summary judgment even after the defendant has filed their defence, like the present case, provided the plaintiff accounted for such delay (*Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267). *Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Yong* [1987] 1 MLJ 139 is authority for the proposition that generally a plaintiff will not be deprived of obtaining summary judgment even when such an application is made after the defence has been served and like the present case it was filed on 14 May 1994.

There were two delays here. One, was by the plaintiff in filing his summary judgment after the defence was filed. The other was the delay by the defendant in filing his affidavit-in-reply.

On perusal of encls 15A and 28, both the plaintiff and the defendant did not explain those delays. But unlike the defendant, the plaintiff was in a better position. Order 14 of the RHC is silent as to the consequences of delay in filing the summary judgment and, in my judgment, the failure to explain the delay will not be construed unfavorably against the plaintiff. In *Tractors Malaysia Bhd v Joseph Thambirajah & Anor* [1986] 2 CLJ 72 where there was a delay of one year to file an O 14 application and though such delay was not accounted for, yet the court there condoned the delay. I too would condone the plaintiff's delay and more so as the time span is shorter. The defendant's position in so far as that delay was concerned is on flimsy ground on the authority of *Wing Tiek Holdings Bhd v Yong Chee Thiam & Anor* [1994] 3 MLJ 379 where Shaik Daud J (now JCA) held, inter alia, that all affidavits-in-reply to O 14 applications must comply with O 32 r 13(2)(b), failing which the affidavits ought not to be considered. For these reasons, I ruled that encl 28 will not be considered for purposes of the O 14 application.

So much for the preliminary objection and now to the crux of the problem.

It is now trite that the purpose of an O 14 application is to enable a plaintiff to obtain summary judgment without the rigmarole of a trial provided that the plaintiff can clearly prove his claim and the defendant is unable to set up a bona fide defence or a triable issue (*Roberts v Plant*

[1895] 1 QB 597 (CA); *Robinson, King & Co v Lynes* [1894] 2 QB 577). If judgment is obtained without a trial then the defendant is deprived of an opportunity to give evidence in the witness box. This must surely be the effect of an O 14 application. As Halsbury LC observed in *Jacobs v Booths Distillery Co* (1901) 85 LT 262 (HL):

> People do not seem to understand that the effect of O 14 is that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in court; that his rights are not to be litigated at all. There are something too plain for argument; and when there were pleas put in simply for the purpose of delay which only added to the expense, and where it was not in aid of justice that such things should continue, O 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the right of parties by delay, and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights.

Even though the defendant is barred from relying on encl 28, they are perfectly at liberty to roam at large and in the words of O 14 r 3(1) of the RHC the defendant has to satisfy the court 'that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial.' And as can be seen presently, the defendant took pains to satisfy the court 'that there ought for some other reason to be a trial.'

Now, what are the facts which the plaintiff relied upon to obtain summary judgment? From the statement of claim, the plaintiff claims against the defendant a sum of RM1m together with interest thereon at the rate of 8% pa from November 1985 till the date of full payment being a sum which the plaintiff claims it has deposited in a fixed deposit account with the defendant. It was the plaintiff's case that on or about 2 November 1985 they deposited a total sum of RM1m with the defendant's branch office at no 87–88, Jalan Rahmat, 83000 Batu Pahat, Johor. The defendant was said to have acknowledged receipt of the deposited sum and issued to the plaintiff two fixed deposit receipts amounting to RM500,000 each which were scheduled to mature on 2 February 1986. On various dates, particularly between 2 February 1986 to 18 August 1987, the fixed deposit receipts were renewed. The last expiry date for these fixed deposit receipts were said to be on 2 February 1988. Incidentally, these fixed deposit receipts were in the name of 'Pengerusi Jawatankuasa Zakat dan Fitrah' which is the account of the plaintiff. These fixed deposit receipts were also exhibited in encl 15A — the affidavit of Dato' Haji Lokman bin Thany adverted to in the early part of this judgment and affirmed in support of the O 14 application in encl 15.

Reverting back to the statement of claim, it was also the plaintiff's averment that, firstly, the defendant was liable under the fixed deposit receipts to refund the RM1m with interest and, secondly, the plaintiff was entitled to assume that all things connected with the transactions and pertaining to the fixed deposits have been validly done. Alternatively, the plaintiff grounded their case on the argument that the defendant

held the RM1m deposit as constructive trustee of the plaintiff. But on 30 January 1988, when the plaintiff demanded for the return of RM1m, the defendant refused to oblige and the plaintiff averred that the defendant was indebted to the plaintiff for that sum plus the interest thereon.

Cik Ong Ming Suan argued that the statement of claim disclosed no cause of action against the defendant. In para 5 of the statement of claim it was averred that the defendant was liable to pay back the money and this was said to be insufficient as it did not state whether there was a breach of contract, a breach of duty, negligence or even conversion. That the defendant was entitled to raise this crucial point is beyond dispute. By O 14 r 4(1) of the RHC, the defendant may show cause by 'affidavit or otherwise to the satisfaction of the court' to defeat the application for summary judgment. And by O 14 r 3 of the RHC, the defendant need not show a good defence but need only show an arguable defence or some other reason why there ought to be a trial. Order 16 r 7(1) of the RHC provides that 'every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.' In para 5 of the statement of claim, the plaintiff averred:

> The plaintiff avers that the defendant is liable under the fixed deposit receipts to pay back the deposit of RM1m altogether to the plaintiff and would further contend that the plaintiff is entitled to assume that all things connected with the transactions and pertaining to the fixed deposits of the plaintiff have been validly done upon issuance of the said fixed deposit receipts by the said branch of the defendant to the plaintiff.

The words employed by the draftsman of para 5 of the statement of claim merely plead the legal results or the legal consequences. The draftsman has fallen into the trap of pleading the legal results or the legal consequences when he employed the following words appearing at para 8 of the statement of claim:

> In the premises, the defendant was and is still indebted to the plaintiff the amount of the fixed deposits and interest thereon.

The meaning of 'cause of action' can be distilled from a long line of authorities like *Read v Brown* (1888) 22 QBD 128; *Cooke v Gill* (1873) LR 8 CP 107; and *Hernaman v Smith* (1855) 10 Ex 659; 156 ER 603 to mean:

> every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at p 242 [[1964] 3 WLR 573; [1964] 2 All ER 929; [1964] 2 Lloyd's Rep 339] defined 'cause of action' aptly as:

A simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

Put bluntly, a cause of action is an aggregate of facts which the law will recognize as giving the plaintiff a substantive right to make the claim against the defendant for the relief or remedy which he is seeking. B There is a marked difference between endorsing a writ with a statement of claim and endorsing it with a statement of the nature of the claim. That difference is this: in the former you have to set out the cause of action, whereas in the latter you need only to identify the cause of action. The problem is worsened as the affidavit filed in support of the O 14 application in encl 15A cannot improve the statement of claim C and a perusal of encl 15A discloses the same flaw as found in the statement of claim. In fact encl 15A is an exact replica, word by word of the statement of claim; it virtually repeats the statement of claim paragraph by paragraph.

It is germane to mention here, that the plaintiff adverted to the D issue of constructive trustee in para 6 of their statement of claim as an alternative stand and this is the crucial cause of action that is worth mentioning and that has saved the day for the plaintiff initially and the defendant finally as will be demonstrated in the course of this judgment.

On the question of constructive trustee, the defendant has denied E it in their statement of defence at para 8 of encl 9. Alliot J in *Lipkin Gorman v Karpnale Ltd* [1987] 1 WLR 987 laid down a principle of law that where a banker knowingly assists a customer in committing a breach of trust, the banker becomes liable as a constructive trustee. In that case, the plaintiffs were a firm of solicitors and they had a partner by the name of Cass. The firm kept a bank account with the second F defendant. Cass too had a bank account at the same branch of the bank. He was a gambler who frequented a casino operated by the first defendant. Cass lost large sums of money and this led him to withdraw money from the firm's clients' account. Cheques drawn on clients' accounts were used to purchase chips at the casino. The bank knew that G Cass was a gambler. The plaintiff firm discovered that Cass had made excessive claims for travel expenses and this led Cass to admit that he had acted dishonestly but the firm took no action against him after he assured them that it would not be repeated. The firm continued to allow Cass to draw cheques on the firm's account but they instructed the bookkeeper to monitor Cass's drawings. Cass continued to withdraw H large sums from the account. He was subsequently convicted of theft of the firm's money. The plaintiff firm brought an action against the casino and the bank to recover the money withdrawn from the account. The action against the casino was for conversion of the cheques and as a constructive trustee for having received the stolen money with I knowledge of the partner's breach of trust. As against the bank, the firm alleged that the bank was in breach of contract and also liable as a constructive trustee for having rendered knowing assistance to the partner. Alliot J held that the casino could not be made liable as a

constructive trustee but the bank was liable as a constructive trustee. With regard to the bank, his Lordship decide that the mere presence of a contractual relationship between the plaintiffs and the bank did not prevent the bank from being a constructive trustee. On the question of liability as a constructive trustee, Alliot J had this to say:

> I accept the defendants' submission on this point. I propose to adopt the reasoning and the approach of Sir Robert Megary VC in *Re Montagu's Settlement Trust* [1987] 2 WLR 1192. He was there dealing with a case of knowing receipt, in which category of constructive trustee the first defendants are said to fall. The bank on the other hand, falls into the other category by reason of their alleged knowing assistance to the fraudulent scheme. No suggestion that different degrees or standards of knowledge should apply in respect of the different categories of constructive trustee has been made ... There are, of course, differences in the courts' approach to the two types of constructive trusteeship. In knowing receipt, fraud is irrelevant. The recipient will be liable, if with want of probity on his part he had actual or constructive knowledge that the payor was misapplying trust money and that the transfer to him was in breach of trust. In knowing assistance, the stranger to the trust must be proved subjectively to know of the fraudulent scheme of the trustee when rendering assistance, or to shut his eyes to the obvious, or to have wilfully and recklessly failed to make such inquiries as a reasonable and honest man would make.

It is appropriate to mention here that *Barnes v Addy* (1874) 9 Ch App 244, 245–252 establishes a two-fold classification of constructive trust. The first arises from the knowing receipt and dealing with a trust fund ('knowing receipt') and the other arises from the giving of knowing assistance to a dishonest trustee ('knowing assistance'). The acts involved in 'knowing assistance' may be any act which assist the trustee, except the act of receiving the funds. The mental state required for knowing assistance is something like dishonesty, morally reprehensible behaviour, lack of probity to such a degree that the bank might be said to have been a party to the dishonesty. On the other hand, knowing receipt does not require this degree of fault, but requires lack of probity. In knowing receipt cases, the bank is liable to account only for the funds which it receives or deals with in breach of the trust, whilst in the more serious knowing assistance cases the bank's liability extends to all the losses to the trust fund caused by the dishonest trustee, whether or not the funds came into the hands of the bank.

In the statement of defence (encl 9), the defendant made the following denials:

(1) denied that the plaintiff had deposited RM1m in fixed deposit with them;

(2) denied receipt of RM1m from the plaintiff and denied issuing two fixed deposit receipts;

(3) denied that the fixed deposit receipts were renewed by them as alleged; and

(4) denied liable to pay RM1m as fixed deposit to the plaintiff as alleged.

These denials went to the root of the customer banker relationship and when one takes into account the allegation by the plaintiff that the RM1m fixed deposit was put in the name of the 'Pengerusi Jawatankuasa Zakat dan Fitrah', question of opening a trust account arises. Now, it is said that when a customer opens a trust account, the bank must exercise care to see that payments made by the trustee are not in breach of trust. It is also said that the bank must not allow the trustees to draw on the account for their own benefit. Way back in 1881, Fry J in *Foxton v Manchester & Liverpool District Co* (1881) 44 LT 406 decided that a banker was accountable to the beneficiaries when trustee drew on the trust account to pay off their personal overdrafts with the bank. In that case, one William Hardman by his will bequeathed a sum of £21,000, the income of which was to be given to his three daughters for life and upon their death, to their children. The testator's two sons, Edmund Hardman and Henry Hardman, were named as the executors and trustees of the funds. The trustees opened an account with the defendant bank. They also had personal overdrafts with the defendant bank. The trustees transferred various sums from the trust account into their personal accounts to reduce their overdrafts with the bank. In an action by the beneficiaries to recover the sums wrongly withdrawn from the trust account, Fry J held that the bank was liable to the beneficiaries because they had received the money with the knowledge that it came from a trust fund. Fry J said (at p 408):

> Now it appears to be plain that the bank could not derive the benefit which they did from that payment, knowing it to be drawn from a trust fund, unless they were prepared to show that the payment was a legitimate and proper use, having reference to the terms of the trust. It is said that they did not know what the trust was at that time. That appears to me, I confess, to be immaterial, because those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment of the money.

Reverting back to the statement of claim, although the plaintiff was entitled to assume that all matters of internal management in the defendant's bank had been duly complied with in so far as it relates to the fixed deposit transactions and, consequently, the plaintiff would not be affected by irregularities of which they had no notice, that rule, however, applies only to irregularities that might otherwise affect a genuine transaction. It cannot, however, apply to forgery as well as fraud. Fraud was raised by the defendant as a defence and this is clearly seen in para 5 of the statement of defence.

In my judgment, the defendant succeeded in establishing bona fide triable issues to defeat the O 14 application. Constructive trustee and fraud are substantive legal issues which require close investigations and, in the interest of justice, there should be a trial. The principles of knowing receipt and knowing assistance would come into play in the

context of a relationship between a banker and a customer and these would only be ventilated through witnesses during the trial proper. From the facts, this is certainly not a plain and straight forward case. It is devious and crafty and a trial is the best solution (*Miles v Bull* [1969] 1 QB 258; [1968] 3 WLR 1090; [1968] 3 All ER 632). Put in another way, this is a complicated case and it is desirable that if the plaintiff is to get judgment it should be after a trial. This by itself constitutes 'some other reason' (*Bank für Gemeinwirtschaft Aktiengesellschaft v City of London Garages* [1971] 1 WLR 149; [1971] 1 All ER 541).

There is another twist to the case. The defendant has since filed a third party notice against MUI Continental Insurance Sdn Bhd (encl 7) seeking indemnity and by encl 17 the defendant has also filed a statement of claim against the third party. The third party too, by encl 27, filed their amended statement of defence of third party against the statement of claim of the defendant. The presence of this third party brings it within the ambit of 'some other reason' as to warrant a trial.

For the above reasons, I dismissed encl 15. In view of the circumstances of the case, there be no order as to costs.

Application dismissed.

Reported by Timon Shum